Ahmad Ikhwan bin Ahmad Fauzi v Mohd Fahimi bin Endut (father and next of kin to Ahmad Safwan Hanim bin Mohd Fahimi) & Ors and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(f)-5–02 OF 2023(T) AND 01(f)-6–02 OF 2023(T)
ABANG ISKANDAR PCA, MARY LIM AND ABDUL KARIM FCJJ
29 MARCH 2024

Tort — Assault and battery — Evidence — Five students in residential school assaulted and injured their fellow student in school — Whether assailants' guilty plea in magistrate's court on charge of hurting their victim was relevant and admissible evidence in victim's civil suit against assailants for damages for assault and battery — Whether school authorities owed victim duty of care to ensure he was not harmed by anyone as long as he was under their care and supervision — Whether bullying and assault was reasonably foreseeable event in schools and school authorities were therefore vicariously liable to victim for damages he suffered — Whether acts/omissions of assailants and negligence of school authorities in breaching their duty of care to victim also made Education Ministry and Malaysian Government vicariously liable

Late one night in April 2015, the appellant was assaulted by five of his schoolmates in a room at the Sekolah Menengah Sains Sultan Mahmud residential school in Kuala Terengganu. The assault perforated his right ear drum leaving him deaf in that ear. His assailants (the respondents in Appeal No 5 herein) were charged in the magistrate's court with causing hurt to the appellant. They pleaded guilty and were discharged on a good behaviour bond for two years on a RM1,000 surety without any conviction being recorded. The appellant sued his assailants for damages for the assault and battery and also cited the school's senior assistant in charge of student affairs, the school's principal, the Director-General of Education and the Malaysian Government (the respondents in Appeal No 6 herein) as co-defendants, holding all four of them vicariously liable for the actions of the five schoolboys. Following a trial, the High Court allowed the appellant's claim against all the defendants/respondents and awarded him general and special damages as well as RM120,000 as exemplary damages. The appellant appealed against quantum whilst all the defendants/respondents appealed against both liability and quantum. The Court of Appeal ('COA') set aside the trial court's decision on liability and then, curiously, reduced the general damages awarded to the appellant to only RM5,000 and slashed down to RM84,000 the RM252,000 the trial court had awarded the appellant to meet the costs (including future replacement costs) of his hearing aids. The exemplary costs of RM120,000 was

A set aside. The COA held that: (a) the evidence was insufficient to prove that the assault actually happened as, inter alia, there were no injuries on his person; (b) adverse inference had to be invoked against the appellant for not calling the Ketua Pengawas and his deputy to testify at the trial if, as he had claimed, they had witnessed the assault taking place without doing anything to stop it; (c) the B trial court erred in relying entirely on the assailants' guilty pleas before the magistrate to find that the appellant had proven his civil claim; and (d) the trial court was wrong to have held the respondents in Appeal No 6 vicariously liable as the alleged assault of the appellant was not something that was reasonably foreseeable. The instant appeal was against the COA's decision. C

Held, unanimously allowing the appeal, setting aside the COA's decision and restoring the High Court's decision and the damages it had awarded:

(1) Contrary to the COA's findings, there was ample evidence to prove that D the first five defendants (in the High Court) had assaulted and battered the appellant. This court found that all the defendants (all respondents in this appeal) were liable (see paras 26 & 51).

(2) The admissions of guilt made by the five defendant schoolboys in the E magistrate's court were relevant and admissible to the allegation that an assault involving the appellant and the defendants did indeed take place. The admissions were not introduced for the purpose of proving the fact of convictions on the charge under s 323 (as no convictions were recorded) but to show the fact that such admissions existed. Similarly, the F magistrate's decision in relation to the guilty pleas was relevant to the whole narrative of the appellant's claim. Whilst no conviction was recorded, for the purpose of the present civil proceedings the decision remained relevant but did not in itself prove the tort alleged. Although s 31 of the Evidence Act 1950 cautioned that admissions were not G conclusive proof of the matters admitted, they were relevant until proven otherwise (see paras 27–29).

(3) The defendants never denied the admissions they made. They admitted to assaulting the appellant when disciplinary proceedings were taken against them by the school. The stern action that was taken against them H corroborated the appellant's claim of assault. Again, they maintained their admissions at the trial of the present civil action and that evidence was corroborated by the medical evidence of SP9, SP2 and SP5 who testified to the injuries that were sustained by the appellant. All these pieces of evidence were evaluated by the trial judge who held on balance I of probabilities that the appellant had proven his case. The trial judge had the audio-visual advantage of seeing and hearing the witnesses testify and the COA should have been slow to interfere with the trial judge's findings of fact. Contrary to the COA's findings, the trial judge's findings were correct on the facts and in law. The COA erred in coming to the

conclusion that the trial court had found liability against the respondents based entirely on their guilty pleas in the magistrate's court (see paras 30–37).

(4) The respondents in Appeal No 6 owed a duty of care to all students enrolled in the school, collectively and individually and were responsible for the safety, welfare and well-being of the students whilst they were within the school's premises (see para 41).

(5) The facts and circumstances of the case showed that bullying or physical assault of the appellant was reasonably foreseeable. This was because spot checks were regularly carried out in the premises of the school to ensure that discipline and rules and regulations were adhered to and posters provided by the Education Ministry were displayed in the school's premises warning against bullying. This showed that bullying in schools was an activity that was well within the reasonable contemplation of the authorities including the respondents in Appeal No 6 (see paras 44–45).

(6) Since it was reasonably foreseeable that bullying would occur in residential schools, and the appellant was indeed bullied and assaulted by his fellow students, the respondents in Appeal No 6 owed the appellant a duty of care to keep him safe from harm including any form of bullying by any person or persons within their control. The presence of the two school prefects who watched the appellant being assaulted but who did not do anything to stop the assault was evidence of negligence to which the respondents remained vicariously and personally liable. The respondents thus remained accountable for the acts of bullying and physical assault that was occasioned by the five schoolboys as it appeared that not enough was done to prevent the abusive acts from happening (see paras 47 & 49–50).

(7) The Government of Malaysia was vicariously liable for the failure and omissions on the part of the school's principal, its senior assistant in charge of student affairs and the Director-General of Education as the latter persons were the means by which the Government effectuated its duties and responsibilities in relation to education in a residential school. The Government remained in control of these persons, including the schoolboys who assaulted the appellant, and was thus responsible and liable for their acts and omissions (see para 48).

(8) There was no conceivable reason for the COA to disturb the trial court's awards on damages and the High Court's orders on compensation were therefore reinstated (see paras 52 & 54).

[Bahasa Malaysia summary

Lewat malam pada April 2015, perayu telah diserang oleh lima rakan sekolahnya di sebuah bilik di sekolah berasrama penuh Sekolah Menengah

A Sains Sultan Mahmud di Kuala Terengganu. Serangan itu menembusi gendang telinga kanannya menyebabkan dia pekak di telinga itu. Penyerangnya (responden dalam Rayuan No 5 di sini) didakwa di mahkamah majistret kerana menyebabkan kecederaan kepada perayu. Mereka mengaku bersalah dan dilepaskan dengan bon berkelakuan baik selama dua tahun dengan
B penjamin RM1,000 tanpa sebarang sabitan direkodkan. Perayu menyaman penyerangnya untuk ganti rugi bagi serangan dan bateri dan juga menyebut penolong kanan sekolah yang bertanggungjawab dalam hal ehwal pelajar, pengetua sekolah, Ketua Pengarah Pelajaran dan Kerajaan Malaysia (responden dalam Rayuan No 6 di sini) sebagai defendan bersama, memutuskan
C keempat-empat mereka bertanggungjawab secara vikarius atas tindakan lima pelajar sekolah itu. Selepas perbicaraan, Mahkamah Tinggi membenarkan tuntutan perayu terhadap semua defendan/responden dan memberikannya ganti rugi am dan khas serta RM120,000 sebagai ganti rugi teladan. Perayu
D merayu terhadap kuantum manakala semua defendan/responden merayu terhadap kedua-dua liabiliti dan kuantum. Mahkamah Rayuan ('MR') mengenepikan keputusan mahkamah perbicaraan mengenai liabiliti dan kemudian, secara persoalannya, mengurangkan ganti rugi am yang diberikan kepada perayu kepada hanya RM5,000 dan mengurangkan kepada RM84,000
E daripada RM252,000 yang diaward oleh mahkamah perbicaraan kepada perayu untuk memenuhi kos (termasuk kos penggantian masa hadapan) alat bantuan pendengarannya. Kos teladan sebanyak RM120,000 telah diketepikan. MR berpendapat bahawa: (a) keterangan tidak mencukupi untuk membuktikan bahawa serangan itu benar-benar berlaku kerana, antara lain,
F tiada kecederaan ke atas orangnya; (b) inferens bertentangan perlu dibuat terhadap perayu kerana tidak memanggil Ketua Pengawas dan timbalan beliau untuk memberi keterangan pada perbicaraan jika, seperti yang didakwanya, mereka telah menyaksikan serangan itu berlaku tanpa melakukan apa-apa untuk menghentikannya; (c) mahkamah perbicaraan terkhilaf dalam
G bergantung sepenuhnya kepada pengakuan bersalah penyerang di hadapan majistret untuk mendapati bahawa perayu telah membuktikan tuntutan sivilnya; dan (d) mahkamah perbicaraan adalah salah kerana telah memutuskan responden dalam Rayuan No 6 bertanggungjawab secara vikarius kerana dakwaan serangan perayu bukanlah sesuatu yang boleh diramalkan
H dengan munasabah. Rayuan semasa adalah terhadap keputusan MR.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan MR dan memulihkan keputusan Mahkamah Tinggi dan ganti rugi yang telah diberikan:

I (1) Bertentangan dengan dapatan MR, terdapat keterangan yang mencukupi untuk membuktikan bahawa lima defendan pertama (di Mahkamah Tinggi) telah menyerang dan memukul perayu. Mahkamah ini mendapati semua defendan (semua responden dalam rayuan ini) bertanggungjawab (lihat perenggan 26 & 51).

(2) Pengakuan bersalah yang dibuat oleh lima budak sekolah defendan di mahkamah majistret adalah relevan dan boleh diterima dengan dakwaan bahawa serangan yang melibatkan perayu dan defendan memang berlaku. Pengakuan itu tidak diperkenalkan untuk tujuan membuktikan fakta sabitan atas pertuduhan di bawah s 323 (kerana tiada sabitan direkodkan) tetapi untuk menunjukkan fakta bahawa pengakuan tersebut wujud. Begitu juga, keputusan majistret berhubung pengakuan bersalah adalah relevan dengan keseluruhan naratif tuntutan perayu. Walaupun tiada sabitan direkodkan, bagi tujuan prosiding sivil semasa, keputusan itu tetap relevan tetapi tidak dengan sendirinya membuktikan tort yang didakwa. Walaupun s 31 Akta Keterangan 1950 memberi amaran bahawa pengakuan bukanlah bukti muktamad bagi perkara yang diakui, ia adalah relevan sehingga dibuktikan sebaliknya (lihat perenggan 27–29).

(3) Defendan tidak pernah menafikan pengakuan yang mereka buat. Mereka mengaku telah menyerang perayu apabila prosiding tatatertib diambil terhadap mereka oleh pihak sekolah. Tindakan tegas yang diambil terhadap mereka menguatkan dakwaan serangan perayu. Sekali lagi, mereka mengekalkan pengakuan mereka pada perbicaraan tindakan sivil sekarang dan keterangan itu disokong oleh keterangan perubatan SP9, SP2 dan SP5 yang memberi keterangan mengenai kecederaan yang dialami oleh perayu. Kesemua keterangan ini telah dinilai oleh hakim perbicaraan yang memutuskan pada imbangan kebarangkalian bahawa perayu telah membuktikan kesnya. Hakim perbicaraan mempunyai kelebihan audio-visual untuk melihat dan mendengar saksi memberi keterangan dan MR sepatutnya lambat mengganggu dapatan fakta hakim perbicaraan. Bertentangan dengan dapatan MR, dapatan hakim perbicaraan adalah betul berdasarkan fakta dan undang-undang. MR terkhilaf membuat kesimpulan bahawa mahkamah perbicaraan telah mendapati liabiliti terhadap responden berdasarkan sepenuhnya pengakuan bersalah mereka di mahkamah majistret (lihat perenggan 30–37).

(4) Responden dalam Rayuan No 6 mempunyai tugas berhati-hati terhadap semua pelajar yang mendaftar di sekolah, secara kolektif dan individu dan bertanggungjawab ke atas keselamatan, kebajikan dan kesejahteraan pelajar semasa mereka berada di dalam premis sekolah (lihat perenggan 41).

(5) Fakta dan keadaan kes menunjukkan bahawa buli atau serangan fizikal perayu adalah munasabah boleh diramalkan. Ini kerana pemeriksaan mengejut kerap dilakukan di premis sekolah bagi memastikan disiplin dan peraturan dan undang-undang dipatuhi serta poster yang disediakan oleh Kementerian Pendidikan dipamerkan di premis sekolah amaran terhadap buli. Ini menunjukkan bahawa buli di sekolah adalah satu

aktiviti yang berada dalam renungan munasabah pihak berkuasa termasuk responden dalam Rayuan No 6 (lihat perenggan 44–45).

(6) Memandangkan ia boleh diramalkan bahawa buli secara munasabah akan berlaku di sekolah berasrama penuh, dan perayu sememangnya dibuli dan diserang oleh rakan pelajarnya, responden dalam Rayuan No 6 mempunyai tugas berhati-hati terhadap perayu untuk memastikan dia selamat daripada bahaya termasuk sebarang bentuk buli oleh mana-mana orang atau orang dalam kawalan mereka. Kehadiran dua pengawas sekolah yang melihat perayu diserang tetapi tidak melakukan apa-apa untuk menghentikan serangan itu adalah bukti kecuaian yang mana responden tetap bertanggungjawab secara vikarius dan peribadi. Oleh itu, responden tetap bertanggungjawab terhadap perbuatan buli dan serangan fizikal yang dilakukan oleh lima pelajar sekolah itu kerana nampaknya tidak cukup tindakan yang dilakukan untuk mengelakkan perbuatan penganiayaan itu berlaku (lihat perenggan 47 & 49–50).

(7) Kerajaan Malaysia bertanggungjawab secara vikarius bagi kegagalan dan peninggalan di pihak pengetua sekolah, penolong kanannya yang bertanggungjawab dalam hal ehwal pelajar dan Ketua Pengarah Pelajaran kerana orang yang terkemudian itu adalah cara Kerajaan melaksanakan tugas dan tanggungjawabnya berhubung dengan pendidikan di sekolah berasrama penuh. Kerajaan kekal mengawal orang-orang ini, termasuk budak sekolah yang menyerang perayu, dan dengan itu bertanggungjawab dan bertanggungan atas perbuatan dan peninggalan mereka (lihat perenggan 48).

(8) Tiada sebab yang boleh difikirkan untuk MR mengganggu award mahkamah perbicaraan mengenai ganti rugi dan oleh itu perintah Mahkamah Tinggi mengenai pampasan telah dikembalikan semula (lihat perenggan 52 & 54).]

Cases referred to

Government of Malaysia & Ors v Jumat bin Mahmud & Anor [1977] 2 MLJ 103; [1977] 1 MLRA, FC (refd)

Home Office v Dorset Yacht Co Ltd [1970] 2 All ER 294; [1970] AC 1004; [1970] 2 WLR 1140, HL (refd)

Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors [1981] 2 MLJ 27; [1980] 1 MLRA 10; [1982] CLJ Rep 232, FC (refd)

Nurul Atikah binti Mustafa Kamal (seorang kanak-kanak mendakwa melaluibapa atau wakil litigasi, Mustafa Kamalbin Omar) v Nurazlina Suriani binti Zulkifly & Ors [2019] MLJU 178; [2019] MLRH 393; [2019] 9 CLJ 395, HC (refd)

Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd [1961] 1 All ER 404; [1961] AC 388; [1961] 2 WLR 126, PC (refd)

Legislation referred to

Criminal Procedure Code s 173A
Evidence Act 1950 ss 21, 31, 43
Penal Code ss 34, 323

Appeal from: *Sulaiman bin Ngarif dan lain-lain lwn Ahmad Ikhwan bin Ahmad Fauzi (mendakwa melalui bapa dan sahabat wakilnya, Ahmad Fauzi bin Abdullah) dan satu lagi rayuan* [2022] 5 MLJ 972 (Court of Appeal, Putrajaya)

Hisyam bin Yusof (with Wan Azliana bt Wan Adnan, Nik Nur Syazwani bt Nik Suhaimi and Diyana bt Ibrahim) (Wan Adnan & Partners) in Civil Appeal Nos 01(f)-5–02 of 2023(T) and 01(f)-6–02 of 2023(T) for the appellant.
Azrulrizal bin Ibrahim (Azman, Wan Helmi & Assoc) in Civil Appeal No 01(f)-5–02 of 2023(T) for the first respondent.
Nik Mohd Radhia bin Nik Abdul Ghani (with Wan Ahmad Faiz bin Wan Abdullah, Wan Solehah bt Wan Mohamad and Mat Zaidan bin Ali) (WM Haidi & Assoc) in Civil Appeal No 01(f)-5–02 of 2023(T) for the second, third, fourth and fifth respondents.
Andi Razalijaya bin A Dadi (with Zureen Elina bt Mohd Dom, Safiyyah Omar, Mohd Khairulhazman bin Ghazali and Ahmad Hafizuddin bin Manjur Ahmad) (Attorney General's Chambers) in Civil Appeal No 01(f)-6–02 of 2023(T) for the sixth, seventh, eighth and ninth respondents.

Mary Lim FCJ (delivering judgment of the court):

[1] These appeals concern a most unfortunate event of assault in a residential school, what is frequently referred to as 'school bullying'. Schools of any arrangement are for learning, where a person is educated in the many disciplines and subjects, preparing them for responsibilities, choices and positions in life. These are important formative years where personalities are formed and traits enhanced. It is therefore only reasonable and fair to expect that these places of learning, even if residential facilities are provided, are safe and conducive. In the case of residential schools, the responsibility would obviously be even wider and more extensive.

[2] In these appeals, the appellant, a student of a residential school sued not just the students who assaulted him but also those who were charged with the responsibility of running and managing the residential school. The claim was allowed by the High Court but on appeal, the decision was reversed. After a full hearing, we unanimously allowed the appeal and restored the decision of the High Court but declined to make any award for aggravated or exemplary damages. These grounds contain our reasons for that decision.

A THE ASSAULT

[3] Sekolah Menengah Sains Sultan Mahmud ('SESMA') Kuala Terengganu is a residential school. I understand it is one of the most coveted residential schools in the country, offering secondary education. The appellant together with the first five defendants cited at the High Court, were students at that school.

[4] Between the hours of 10.40pm of 26 April 2015 and 2am of the following day, the appellant claimed that he was taken to the Bilik Asrama Ketua Pengawas and Penolong Ketua Pengawas located within the school, where he was repeatedly assaulted by the first five defendants. Both the Ketua Pengawas and the Penolong Ketua Pengawas who were in the room, watched. Although they did not take part in the assault, they did nothing to stop it.

[5] The appellant sustained injuries to his right ear, face and body. Despite his injuries, the appellant did not complain about the incident to anyone. Instead, he went to bed and when he awoke in the morning, found himself bleeding from his right ear. He informed the warden of the bleeding but not the reason; according to him, for fear of reprisal. He was treated at a local clinic with a follow-up scheduled for 29 April 2015.

[6] It was only at the follow-up on 29 April 2015 that he told of the reasons for the bleeding and of his other injuries. His father was called in and he was then brought to the hospital by his father. There, it was found that he had a perforated right ear. The appellant has since lost hearing in his right ear.

[7] A police report was lodged on 30 April 2015.

[8] On 27 April 2016, the first five defendants were charged at the magistrates' court for an offence under s 323 of the Penal Code read with s 34 of the same Code. On 1 June 2016, the first five defendants pleaded guilty to the charge and were given a good behaviour bond for two years with a monetary surety of RM1,000 under s 173A of the Criminal Procedure Code where a conviction for the offence charged would not be recorded. There was no appeal, be it by these five defendants or by the prosecution.

[9] Meanwhile, the appellant transferred to another school, upon his own request as he became somewhat fearful following the assault and battery and was unable to focus on his studies. This was after representatives from the school called on the appellant and his family at home, offering to settle the incident with a payment of RM1,000. The offer was rejected.

[10] The school took disciplinary action against the first five defendants. The first four defendants were suspended from school for two weeks whilst the fifth defendant was expelled. He, however appealed and was allowed to be transferred to another school.

[11] The appellant sued the first five defendants for the tort of assault and battery and the sixth to the ninth defendants for principally failing to ensure that he was safe whilst at the residential school. The appellant claimed that the sixth to the ninth defendants were also vicariously liable for the tort of the first five defendants.

[12] For the purpose of these appeals, we will refer to the respondents before us in their capacities at the High Court, namely as the first five defendants in relation to the students who are alleged to have physically assaulted the appellant; the sixth and seventh defendants being the persons in charge of the school; the eighth and ninth defendants, the ministry and the government, entities ultimately responsible for the other defendants.

AT THE HIGH COURT

[13] At the trial, the appellant testified how he was assaulted by each of these five defendants. The first defendant punched, beat, hit his face with a rugby ball and ordered him to do squats; and if he fell whilst doing the squats, he would be further beaten. The second defendant punched and hit him in the body aside from pushing his head against a locker door. The third defendant punched, hit and used his knees to hit him in his stomach as well as hit his head against the third defendant's knees and elbows. The fourth and fifth defendants punched, beat and hit him in his stomach and his body.

[14] The learned judge was satisfied that the claim was proved against these defendants. As for the other defendants, the learned judge found that since the incident happened well within the premises of the school, that because the Bilik Ketua Pengawas and the Bilik Penolong Ketua Pengawas were part of the administration of the school, the sixth and seventh defendants as the Penolong Kanan Hal Ehwal Murid and the Pengetua were thus liable for the acts of the first five defendants.

[15] At paragraph 20 of his reasons, the learned judge accepted the pleas of guilt of the first five defendants made before the magistrates' court. Since there was no appeal, such pleas were taken as final and binding (*muktamad dan mengikat*). According to His Lordship, this meant that these defendants were liable for their acts. Specifically, the High Court found that had the warden on duty inspected the dormitories including Bilik Asrama Ketua Pengawas and Penolong Ketua Pengawas on that fateful night as it was his duty to do so, it

would have made a difference in that the incident may not have occurred.

[16] Citing amongst others, *Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors* [1981] 2 MLJ 27; [1980] 1 MLRA 10; [1982] CLJ Rep 232 and *Nurul Atikah binti Mustafa Kamal (seorang kanak-kanak mendakwa melaluibapa atau wakil litigasi, Mustafa Kamalbin Omar) v Nurazlina Suriani binti Zulkifly & Ors* [2019] MLJU 178; [2019] MLRH 393; [2019] 9 CLJ 395 the High Court found the sixth-ninth defendants liable. Aside from awarding general damages for the injuries sustained and special damages of RM4,634.20 together with interest and costs, the learned judge awarded a sum of RM120,000 as exemplary damages but made no award for aggravated damages.

AT THE COURT OF APPEAL

[17] All the defendants appealed. Likewise, the appellant who was dissatisfied with the quantum awarded.

[18] The Court of Appeal identified eight principal issues to be determined. Amongst those issues were:

(a) whether the High Court was entitled to accept the first five defendants' pleas of guilt before the magistrates' court;

(b) whether the Ketua Pengawas and/or Penolong Ketua Pengawas were representatives of the administration of the school;

(c) whether the sixth and seventh defendants were vicariously liable for the acts of the first five defendants; and

(d) whether the eighth and ninth defendants were vicariously liable for the acts of sixth and seventh defendants.

[19] Insofar as the issue of the pleas of guilt was concerned, the Court of Appeal held that whilst the High Court was entitled to rely on the pleas of guilt under s 21 of the Evidence Act 1950, the High Court fell into error in relying entirely on such pleas when concluding that the tort had been proved. As cautioned by s 31 of the Evidence Act 1950, 'admissions are not conclusive proof of the matter admitted'.

[20] According to the Court of Appeal, putting aside the matter of the pleas for a moment, there was actually insufficient evidence to prove the assault; concluding that the evidence led was inconclusive and inconsistent. In the words of the Court of Appeal, if indeed the appellant was repeatedly punched, beaten and hit, there would have been bruises or injuries on the appellant's body. Yet, none were found. Since the Ketua Pengawas and the Penolong Ketua

Pengawas who were said to have stood watching the alleged assault were not called by the appellant, an adverse inference ought to have been drawn against the appellant.

[21] As for the questions of whether the sixth and seventh defendants were representatives of the administration and vicariously liable for the acts of the first five defendants, and the eighth and ninth defendants in turn vicariously liable for these defendants, the Court of Appeal concluded that the High Court was in error in failing to have regard to the fact that the assault and battery was not reasonably foreseeable since it happened in the Bilik Ketua Pengawas, during 'lights out' and when all the students were supposed to be asleep.

[22] The Court of Appeal was of the view that the Bilik Ketua Pengawas was the last place for such an incident to take place (*Pada hemat kami, antara tempat terakhir di sebuah sekolah yang akan dijangka berlakunya perbuatan/kegiatan salah adalah di dalam bilik pengawas*). The Court of Appeal added 'Seorang pengawas adalah sinonim dengan individu berkelakuan baik, berdisiplin dan bertanggungjawab'. Following *Government of Malaysia & Ors v Jumat bin Mahmud & Anor* [1977] 2 MLJ 103; [1977] 1 MLRA, it was neither reasonable nor logical for these defendants to foresee the occurrence of an assault. These defendants thus did not owe the appellant a duty of care.

[23] For completeness, the Court of Appeal dealt with the issue of quantum. It set aside the award for costs of hearing aid of RM252,000 for want of proof but in the next breath, proceeded to award a reduced sum of RM84,000 on account of 1/3 contingency. The Court of Appeal also set aside the awards of general damages (save for a sum of RM5,000) and exemplary damages. It refused to make any award for aggravated damages.

[24] The appellant obtained leave to appeal, posing questions on both liability and on quantum in the two appeals before us.

OUR DECISION

[25] It goes without saying that schools, residential or otherwise must be safe and conducive for the purpose(s) intended. Otherwise, the providers and consumers of such institutions would face considerable difficulties in enrolment, whether of student or teaching faculty.

Proof of assault and battery

[26] Dealing first with the matter of the assault. Having considered the submissions of all learned counsel on behalf of the respective parties, and having combed the records of appeal, in particular the grounds of decisions of

A both the High Court and the Court of Appeal, contrary to the Court of Appeal's findings, there is ample evidence to prove the first to the fifth defendants assaulted and battered the appellant.

B **[27]** First, the admissions of guilt to the charge under s 323 of the Penal Code read with s 34 of the same Code by these defendants. These admissions which were unconditional and voluntarily made are admissible and relevant to the allegation that an assault involving the appellant and these defendants did indeed take place. The admissions were not introduced for the purpose of proving the fact of convictions of the charge under se 323 (for which there were none in view of s 173A of the CPC) in which case s 43 of the Evidence Act 1950 would apply, but for the fact that such admissions existed.

C

D **[28]** Similarly, the decision of the magistrate in relation to the pleas made is also relevant to the whole narrative of the appellant's claim. While there may not be a conviction recorded, for the purpose of the present civil proceedings, the decision remains relevant but does not in itself prove the tort alleged. As provided in s 21 of the Evidence Act 1950, such admissions are relevant and may be proved against these defendants:

E

> 21 *Proof of admissions against persons making them and by or on their behalf*
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> *Admissions are relevant and may be proved as against the person who makes them or his representative in interest;* but they cannot be proved by or on behalf of the person who makes them or by his representative in interest except in the following cases:
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> F
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> (a) an admission may be proved by or on behalf of the person making it when it is of a nature that, if the person making it were dead, it would be relevant as between third persons under section 32;
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> (b) an admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any state of mind or body relevant or in issue, made at or about the time when that state of mind or body existed and is accompanied by conduct rendering its falsehood improbable;
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> (c) an admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission. (Emphasis addded.)

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[29] Although s 31 of the Evidence Act 1950 cautions that such admissions are not conclusive proof, such evidence remains relevant until proved otherwise:

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> 31 Admissions not conclusive proof but may estop
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> Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

[30] The existence of the admissions is entirely relevant to the appellant's case that he was assaulted by these defendants, that the assault resulted in the defendants being charged and lastly, that they admitted and pleaded guilty to the charge before the magistrates' court. The admissions were introduced as part of the narrative of the appellant's case, and not as proof of the tort of assault and battery without more. What must not be overlooked is that these defendants did not for a single moment, deny the existence of these admissions made not just before the magistrates' court but also at several other occasions. That aspect appears to have escaped the attention of the Court of Appeal.

[31] There were at least three such instances of admission. The first was almost immediately after the unfortunate episode when disciplinary proceedings over 'Kes pukul pelajar Tingkatan Dua' were initiated by the school against these defendants without exception. The disciplinary proceedings culminated in their suspension and in the case of the fifth defendant, his expulsion. Their admissions may be found in their written responses to the show cause issued by the school — see exhs 51 and 62–65.

[32] At the trial of this civil claim, these defendants testified that they had written to the school admitting to 'membuli, memukul dan/atau menyerang Plaintif pada malam kejadian tersebut'. These admissions were corroborated by the testimonies of their teachers, SD9 (Amir bin Ya) and SD12 (Azhari bin A Rahman). It was as a result of their respective admissions that punishment as aforesaid were meted out against each of them. This stern action on the part of the school authorities cannot be overlooked and in fact corroborate the appellant's claim of assault.

[33] Next, were the admissions at the trial of the present civil action. Each of these five defendants admitted to their culpability when asked direct questions as to whether they had assaulted the appellant. Each of these defendants admitted to 'memukul, menampar bahagian pipi Plaintif berkali-kali dan/atau menyuruh Plaintif duduk dalam keadaan squat'. See p 882 onwards of the records of appeal. In re-examination by his counsel, the fourth defendant even admitted that he 'tampar dulu baru squat' the appellant.

[34] Then, there was the evidence of the appellant himself for which there was no reason to doubt, whether by the High Court or the Court of Appeal. This was a classic case where the High Court had the video audio advantage and the Court of Appeal should have been slow to interfere in the findings of fact of the High Court.

[35] The doctors who attended to the appellant soon after the assault also testified on the injuries sustained by the appellant — see evidence of SP9 (Dr Azrahayu bt Azmi), SP2 (Dr Ehsan Syukri bin Zainun) and SP5 (Dr Fairuz bt

A Mohd Ibrahim). These witnesses opined that the injuries found were consistent with 'kesan trauma diakibatkan benda-benda tumpul, sebagai contojnya hentakan pada kepala ataupun ditampar kuat pada Bahagian telinga'.

B **[36]** All these pieces of evidence were evaluated by the trial judge and His Lordship was satisfied on a balance of probabilities that the appellant's case was proved — see paras 17 to 19 of the grounds of decision. Contrary to the Court of Appeal's findings, the learned judge's findings were correct on the facts and in law.

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[37] The Court of Appeal was therefore in error when it found that the liability against the respondents was based only entirely on the pleas of guilt in the magistrate court by the first five defendants. The learned judge was entitled to rely on the pleas of guilt by these five defendants. More than that, it is clearly evident that there was evidence in abundance to corroborate the appellant's claim of assault by these defendants, should such a need even arise.

D

Test of reasonable foreseeability

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[38] Moving next to the second question of law which is on the standard test of reasonable foreseeability. The law in this respect is trite. The principles on foreseeability as propounded in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] 1 All ER 404; [1961] AC 388; [1961] 2 WLR 126, and applied in *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294; [1970] AC 1004; [1970] 2 WLR 1140 have found roots in our jurisprudence. We see no call to revisit any of these principles. The challenge, as always, is in the application of principles to particular facts.

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[39] Here, the Court of Appeal disagreed with the High Court in holding that bullying or assault was reasonably foreseeable. The Court of Appeal held that the High Court failed to have regard to the fact that the school had rules and regulations on discipline and that such acts were not tolerated. Further, there were no cries for help at the material time, that the episode happened during lights out when all students were supposedly asleep, and it took place in a room which was least expected. The Court of Appeal concluded that the appellant had in fact failed to prove duty of care, presumably the existence of such duty.

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[40] With respect, that is conflating reasonable foreseeability with actual and subjective foreseeability, the existence of a duty of care with breach of the duty of care.

[41] It cannot be denied that the sixth to the ninth defendants do owe a duty of care to all students enrolled in the school, collectively and individually. That includes a duty owed to the appellant. Whilst within their premises and the compound of the premises of the school, these defendants are responsible for their safety, welfare and well-being, that these students are safe from harm, whether caused by conditions of the premises themselves or by others occupying or licenced to be within the premises.

[42] We have already expressed views to this effect in *Government of Malaysia & Ors v Jumat bin Mahmud & Anor* and *Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors*, that by reason of the special relationship between teachers and similar personnel and the student, the teachers owe a duty to the student to take reasonable care for the safety of the student. School teachers and other similar personnel are under a duty to supervise the students when the students are within the school, for the ultimate purpose of maintaining discipline, safety and well-being of the students. The degree of supervision depends on the circumstances of each case — see *Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors*.

[43] In these appeals, the bullying took place at the Bilik Ketua Pengawas, a room so designated by these defendants. Although it may have been the last place that one would expect that assault and battery as complained of would occur, it is beyond the pale that the appellant was physically assaulted in that room between the hours and on the day identified.

[44] From the facts and circumstances, the bullying or physical assault that unfortunately occurred in the Bilik Ketua Pengawas on that fateful night was indeed reasonably foreseeable. The evidence of Cikgu Rahmat (SD13) amongst others pointed to the fact that spot checks were carried out in the premises including in the Bilik Ketua Pengawas but on that night, SD13 omitted checking that room during his rounds. Spot checks by their very nature are to ensure discipline and compliance with rules and regulations; routinely carried out by those responsible either knowingly of the likelihood of indiscipline or there had in fact being some previous episode of disobedience or non-compliance of rules or regulations such as the failure to comply with lights out. Whatever may be the reason for conducting spot checks, it is undeniable that the Bilik Ketua Pengawas was not spared in those spot checks.

[45] The display of posters against bullying, as provided by the Ministry of Education around the premises of the residential school further support the view that bullying was well within the reasonable contemplation of the authorities, including the sixth to the ninth defendants. Those in charge of the supervision of the residential school cannot thus make any credible argument on lack of foreseeability.

[46] 'Bullying' by whatever name or label and however carried out and by whosoever, unfortunately continues to occur in what is supposed to be our safe havens of education. There is no distinction between residential or any type of school. The dissemination and display of such posters may even be said to be part of the efforts taken by the authorities to ensure the safety of the students. Yet, the discipline of students of all ages remains a necessary part of any education curriculum. Basic values of mutual respect for another must be inculcated in all our young and it should not be left to expensive and unfortunate incidents such as revealed in these appeals to remind us of these values.

[47] Since it was reasonably foreseeable that bullying would occur within the premises of the residential school, and the appellant was indeed bullied in that he was assaulted by his fellow students, it is no longer an issue of non-foreseeability. The sixth to the ninth defendants remain accountable for the acts of bullying and physical assault occasioned by the first five defendants as it would appear, not enough was done to prevent the abusive acts from happening.

Vicarious liability

[48] On this issue, it is clear that the failure and omissions on the part of the sixth–eighth defendants render the ninth defendant, the Government of Malaysia to be vicariously liable. These persons are but the means by which the ninth defendant effectuate its duties and responsibilities in relation to education in a residential school. The ninth defendant remains in control of these defendants including the students, the first five defendants, and is thus responsible and liable for their acts and omissions.

[49] Since the damage (the bullying) to the appellant is reasonably foreseeable, these defendants indeed owe the appellant a duty of care to keep him safe from harm, including any form of bullying by any persons within the control of these defendants. The first five defendants are not strangers in the school and these defendants are responsible for their acts and/or omissions. The fact that the school is a residential school makes not a shred of difference to the issue of accountability and liability in law.

[50] The further fact that the bullying or physical assault on the appellant took place in the prefects' room (Bilik Ketua Pengawas and Penolong Ketua Pengawas) does not make any difference. Such space or persons are not sacrosanct immune and incapable from unlawful acts, as displayed by the facts. The presence of the two prefects at the material time, even if not called, is not in dispute. Their standing by idle not preventing or saving the appellant from

being bullied for any length of time is evidence of negligence to which these defendants remain vicariously and personally liable.

[51] In the upshot, therefore all the defendants at the High Court and now the respondents before us, are liable.

Damages

[52] As for damages, we reinstated the awards as to the various head of damages in favour of the appellant as ordered by the High Court judge. There was no conceivable reason for the Court of Appeal to disturb the award of the High Court on the matter of hearing aids. The need for such aids was certainly there and there was again, plenty of evidence to support the appellant's claim for replacement of these aids over the course of time to come. The Court of Appeal was further inconsistent to on the one hand, set aside the award for such replacement costs and in the very next moment, make some award, though reduced.

[53] In respect of the award for aggravated damages and exemplary damages, we decline to award any aggravated damages or to increase the award on exemplary damages.

CONCLUSION

[54] The order of the Court of Appeal is therefore hereby set aside and the High Court orders on compensation are reinstated. We order costs of RM150,000 here and below subject to payment of allocator fee.

Appeal allowed; COA's decision set aside; and High Court's decision and damages awarded restored.

Reported by Ashok Kumar